SUPREME COURT, U. S.

SUPREME COURT, U.S.
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IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1973

RIBLET TRAMWAY COMPANY, a corporation,

Petitioner,

vs

KENT D. SIMON,

Respondent.

No. 73-222

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the

State of Washington

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MA 4-4184

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Petitioner,

No.

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Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the

State of Washington

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petitioner, RIBLET TRAMWAY COMPANY, prays that a Writ of Certiorari be issued to review the Judgment of the Supreme Court of the State of Washington, entered in the above entitled case on May 3, 1973.

OPINIONS BELOW

The Court of Appeals of the State of Washington, Division III, in Cause No. 518-III, which is printed in Appendix A hereto, page 32, was filed January 30, 1973. The Supreme Court of the State of Washington denied a Petition for Rehearing which is printed in Appendix B hereto, page 46. The opinion of the Court of Appeals Division III is reported at 8 Wn. App. 289, No. 5. The opinion of the Supreme Court of the State of Washington is reported at 82 Wn. 2d 1004.

JURISDICTION

The judgment of the Court of Appeals

Division III of the State of Washington was entered on January 30, 1973. A timely Petition for Rehearing was filed on February 14, 1973, and a Rehearing was denied February 20, 1973. A Petition for Review was timely filed with the Supreme Court of the State of Washington on March 12, 1973. The Supreme Court of the State of Washington denied the Petitioner's Petition for Review on the 1st day of May, 1973. The jurisdiction of this Court is invoked under 28 USC §2101 (c), 2104.

QUESTIONS PRESENTED

1. Whether the provisions of Article I, §10, (clause 1) to the United States Constitution were violated when the Court of Appeals entered a Judgment awarding Kent D. Simon compensation for claimed wages due and owing the said Simon for 1969 as deferred compensation or bonus. The Court of Appeals as well as the trial court in

the Superior Court of Spokane County, had ruled that Kent D. Simon, an employee, was entitled to deferred compensation or a bonus, in the absence of any express agreement, if he had received bonuses in past years, as the court then ruled that the payment of past bonuses in past years to the said Kent D. Simon, the Respondent herein, constituted an implied contract that in each successive year the said employee Simon would receive the same amount of bonus or deferred compensation (the court's interpretation) whether or not there was any oral or written agreement providing therefore. The primary issue on appeal to the Court of Appeals of the State of Washington was whether or not payment of a "bonus" over a ten year period can ripen into an implied contract for compensation where the amount thereof is discretionary to the employer, not negotiated by the employee and independent of the profits

of the plaintiff's contention, (the Respondent herein), as well as the Court of Appeals and the Supreme Court of the State of Washington. On January 30, 1973, the Court of Appeals entered its Judgment sustaining the trial court's award of $2,500 for the claimed bonus payment award in favor of the Respondent Kent D. Simon.

2. Whether the provisions of the 9th Amendment to the United States Constitution were violated when the Court of Appeals sustained the trial court's award of the said bonus.

3. Whether the provisions of the 5th and 14th Amendments to the United States Constitution were violated when the trial court and the Court of Appeals entered Judgment in favor of the Respondent Kent D. Simon for the said bonus of $2,500.

4. Whether the provisions of Article I,

§8 (clause 3) to the United States Constitution were violated when the trial court of the State of Washington and the Court of Appeals to the State of Washington found that independent of any express agreement, the payment of the "bonus" over a ten year period can ripen into an implied contract for compensation where the amount thereof is discretionary with the employer, and not negotiated by the employee or the employer with one another.

5. Whether the trial court's findings are supported by substantial evidence in that it is admitted in the record that there was never any conversation between the said Kent D. Simon and his employer for the payment of any bonus. That all bonus payments were paid in the complete discretion of the employer, RIBLET TRAMWAY COMPANY, over the ten year period to the employee Simon as well as to all of its

other employees. That there was no contractual undertakings reduced to writing which required the RIBLET TRAMWAY COMPANY to make any payment of any bonus to its employees in any sum or amount. That there was never any discussion between the RIBLET TRAMWAY COMPANY and any of its employees, including the Respondent, as to the payment or nonpayment of any bonus.

6. Whether the trial court of the State of Washington, the Superior Court of the State of Washington, and the Court of Appeals findings are supported by substantial evidence in denying the RIBLET TRAMWAY COMPANY a set-off for the overpayment of the vacation pay in the sum of $224.97 to the employee Kent Simon.

The evidence at the trial level which was again set out in the Petitioner's Petition for Review or for modification to the Court of Appeals, showed that the employee Kent Simon

had received his vacation before he terminated his work on June 1, 1969 and that the Respondent was paid this amount as vacation pay prior to the time that he had earned it. That the trial court and the Court of Appeals should have granted the Petitioner, RIBLET TRAMWAY COMPANY's claim for Judgment for vacation overpayment and that the said court's were not correct in not so allowing.

7. Whether the trial court, the Superior Court of the State of Washington, and the Court of Appeals Division III, were correct in failing to grant Judgment to the Petitioner, and that even if the Respondent was found to be entitled to payment for the so-called bonus, the Responden should be deemed to have waived $1,000 of the requested amount.

The Petitioner Kent Simon was informed in April of 1969 when he first gave notice that he

intended to quit his employment on or about the first day of June, 1969, that no bonus would be paid. That the Respondent then continued employment until June of 1969 and quit. That the said continued employment under the advise of the company that there would be no bonus, estopped the Respondent from claiming any pro rata portion of the bonus for that period of time. That when the Respondent terminated his work with the Petitioner, RIBLET TRAMWAY COMPANY, he received his regular monthly salary but was denied the bonus for the period of the five months that he had worked for the employer in the sum of $2,500.00.

8. Whether the trial court, the Superior Court of the State of Washington and the Court of Appeals Division III to the State of Washington violated due process of law and acted arbitrarily, capriciously and unjustly, when

Judgment was entered for the claimed bonus of $2,500 and the set-off claims of the Petitioner RIBLET TRAMWAY COMPANY were denied, when the trial court and the Court of Appeals ruled that the bonus payment was actually earned compensation, and that one cannot be held to waive what is later determined to be earned compensation merely by being put on notice that the employer does not consider the payment in question to be that type of compensation, the later determination that the payment was earned, establishing the Respondent's right thereto.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Clause 3 §8 to the Constitution of the United States provides:

> "The Congress shall have power
>
> to regulate Commerce with foreign nations, and among the several States and with the Indian Tribes."

Article I, §10, clause 1 provides:

> "No state shall enter into any Treaty, Alliance, or Confederation; grant Letter of Marque and Reprisal; coin Money; emit Bills of Credit; make anything but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainer; expos facto Law, or law impairing the Obligation of Contracts, or grant any Title of Nobility."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War for the same offense to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

The Ninth Amendment to the Constitution of the United States provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed

to deny or disparage others retained by the people."

The Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The Petitioner, RIBLET TRAMWAY COMPANY, contested a claim for bonus that was made in the early part of April 1969 by its employee, engineer Kent D. Simon. The engineer Kent Simon, Respondent herein, was employed as an engineer by the RIBLET TRAMWAY COMPANY from May 1959 until June 1969. He was paid a substantial monthly salary and in addition for the ten

years was paid substantial "bonuses" at the end of each year, and in addition the employer contributed without payment from the engineer Simon, a substantial sum of money to an employee profit-sharing trust. Initially the Respondent went to work as a draftsman, became qualified as an engineer and worked as an engineer for the company in Spokane, Washington. His total compensation increased from $3,559.38 for 1959 to $17,087.02 in 1968. This included the bonus payments. The year end "bonus" payments were paid voluntarily by the company to the Respondent Simon during each year of his employment and increased from the first payment of $500.00 in 1959 to the sum of $6,000.00 in 1967 and 1968.

The Respondent voluntarily terminated his employment in June 1969. Initially in April 1969 he had asked the Petitioner company for an annual two month vacation. The company could

not accede to this request as this was the busiest part of the company's business. When he was informed that the company could not do this, he then stated that he was going to quit and retire to Hawaii. At that time he requested a pro rata share of his bonus and was told that there would be no bonus. Nevertheless, the Respondent worked during the months of April and May of 1969 and then terminated his employment. Subsequently he demanded by written communication a pro rata share of his 1969 year end bonus claiming $2,500.00. The company's position was that there had never been a bonus contractual understanding made with any of its employees. That bonuses were made from profits and were made completely discretionary by the company. That there had never been any agreement with any of its employees, including the Respondent Kent Simon, for the payment of any sum of money as bonus

in addition to the regular monthly salary which was paid to each of the employees. Further, that the Respondent had taken his vacation and was overpaid in the sum of $224.97 at his termination by the company, which was a vacation overpayment. And that further when the Respondent was informed directly in April of 1969 that there would be no bonus payment, when he worked during the months of April through June 1, 1969, he was estopped to claim the sum of $1,000.00 if any "bonus" should have been paid for the months of February through April of 1969. That he was put on notice and was estopped to make the claim for any type of this bonus compensation during the remaining months of his employment.

During a prolonged trial in the Superior Court, the trial court, the evidence showed that there had never been any oral or written understandings or agreements between the RIBLET TRAMWAY COMPANY, Petitioner herein, and any

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During a prolonged trial in the Superior Court, the trial court, the evidence showed that there had never been any oral or written understandings or agreements between the RIBLET TRAMWAY COMPANY, Petitioner herein, and any

of its employees, as to any payment of bonus whatsoever. That the RIBLET TRAMWAY COMPANY maintained the lump sum payments were a true bonus, completely discretionary, made only to employees meriting a bonus, and when the RIBLET TRAMWAY COMPANY's profits allowed for such a payment.

Further, that at the trial, Kent D. Simon agreed that he had never had any discussion with any of the management of the RIBLET TRAMWAY COMPANY, including any of its officers or directors, as to bonus payments being due and payable in any amount for any period of time. That he had had no understanding with the company as to when the payments would be made and any amounts if made. That his only conversation about bonuses would have perhaps been thanking one of the officers when the bonus payment was made. That there was no

contract between any of the employees and the company for the payment of any bonus in any amount. That there had never been any oral discussion by the company with any of its employees as to the payment of any bonus. That the Respondent, Kent Simon, agreed, that he knew that it was the company's position that they had the right to determine when and if a bonus should be paid. The trial court then granted the Respondent's Judgment for $2,500 concluding:

> "As a result of the course of dealing between the plaintiff and the defendant corporation through the years 1959 to 1969 as to the method of compensation, the court finds that there developed an implied agreement that the plaintiff's annual salary should be at least as great as the monthly compensation plus the annual lump-sum payment as received in each prior year taking into account the employer's contribution to the employee's profit-sharing trust, and that the regular monthly compensation without the annual lump-sum payment is inadequate compensation in view of the plaintiff's education, experience,

professional license and expertise as a specialist."

The trial court as well as the plaintiff relied primarily upon the case of POWELL vs CRESOTING COMPANY, 172 Wash. 155, 19 P. 2d 919 (1933).

The trial court, in other words, held that the payment of a "bonus" independent of any agreement between the employer- and the employee, over a ten year period could ripen into an implied contract for compensation where the amount thereof was discretionary with the employer and not negotiated by the employee. The trial court as well as the Court of Appeals relied upon POWELL vs REPUBLIC CRESOTING COMPANY, (supra), and both courts answered in the affirmative in respect to the Respondent's claim and analysis of the Powell case.

On January 30, 1973, Division III of the Court of Appeals for the State of Washington issued its Judgment supporting the trial court's award of the claimed bonus of $2,500.00, and in denying the RIBLET TRAMWAY COMPANY's request that if the bonus was paid, that $1,000 should be deducted from the amount as the employee Simon had worked from April through May on notice that no bonus would be paid to him if he worked. Further, the trial court as well as the Court of Appeals denied the vacation overpayment claim of the RIBLET TRAMWAY COMPANY.

A timely Petition for Modification or Petition for Rehearing was filed with the Court of Appeals on February 14, 1973, and denied by the Court of Appeals on February 20, 1973.

A Petition for Review of the Court of Appeals Judgment was timely filed with the Supreme Court of the State of Washington at Olympia, Washington, on or about March 12, 1973.

The Supreme Court of the State of Washington denied the Petition for Review of the Court of Appeals Judgment on May 7, 1973.

The principle controversies are set forth herein in the Questions Presented in this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

The trial court violated due process of law and acted unjustly, arbitrarily and capriciously, when it granted the bonus payment of $2,500 for five months work from January 1, 1969 through June 1, 1969 for the Respondent engineer Kent D. Simon. Further, both the trial court and the appellent courts in the State of Washington denied the Petitioner equal protection of the laws and impaired the validity of the Petitioner's ability to make contracts with his employers by a finding that even though bonus payments are not negotiated by the

employee or employer, a voluntary payment by a company to any employee of a "bonus" over a ten year period can ripen into an implied contract for compensation even though the amount thereof is discretionary with the employer. The record is void of any implied contract or any express agreement between these two parties that the year end bonus should be or ever was deferred salary-compensation or wages or due as a bonus. The Respondent Simon admitted in the record, at trial, that he knew the company and its officers considered the payments to be a pure bonus. Simon never discussed the amounts, the manner or method of payment. No discussion was ever had with the Petitioner, any of its employees or any one at the company that the year end payment was to be deemed salary, wages or deferred compensation. The Respondent Simon admitted that the company had periodically sent letters to each of its

employees including the Respondent Simon where it was stated that the year end payments were bonus. That the trial record is complete with other written communications to the Respondent Simon and other employees that the payment was a bonus and made because the company had the funds. That these exhibits were introduced and accepted by the trial court and evidenced time after time that the word was brought home to all of the employees that the year end payments were a true bonus. That in addition, the word "bonus" was typed on each of the checks wherein the compensation was made. That the trial court summed up the Respondent's testimony in the record by stating:

> "THE COURT:
>
> There is no argument about the facts in the case at all.
>
> If I remember his testimony and he (Simon) made no contention that the company ever agreed to pay him a bonus.

> There was no oral or written contract that he would receive a bonus and he didn't discuss the matter with the officers and it didn't come up at all until he was leaving. There is no argument. The parties agree what the facts are. It is a question of interpretation of the Powell case to me. He never had an explicite understanding that he was to get a bonus.
>
> THE COURT:
>
> My thought was if anyone contemplates an appeal, there is no argument about the facts. I am sure everyone's testimony would be the same. He (Simon) doesn't contend the company mislead or deceived him. It isn't a question of someone having to be a liar. It's a question of legally what are the obligations from an uncountradicted set of facts. It is one of those things there is nothing for the trial court to weigh."

The award made to the Petitioner is so remote from any contractual requirement between the company and its employees, as to constitute a taking of the Petitioner's property and rights without due process. It denies him equal protection of the laws in that it allows an employee to claim discretionary bonuses are in fact deferred compensation independent of

any agreement whatsoever, merely if an employer does voluntarily make bonus payments in past years. The very essence of justice has been denied when the court can read into voluntary ten year payments of bonus an implied contract for compensation that is claimed to be deferred. It opens up a whole host of employer-employee controversies as any employer that now has made voluntary bonus payments for more than one year can be hit be claims by employees for deferred compensation even though the company is unable to pay any bonus. This is because the employees can claim that the bonus payments are in fact deferred compensation because they have been made for more than one year and are due regardless of the company's ability or any inability to pay the. This decision strikes at the heart of the commerce clause of the Constitution of the United States and denies the employer of equal protection of the laws.

It is well known that a person's business is a property right. TRUAX vs CORRIGAN, 1921, 22 S. Ct. 124, 257 U.S. 312, 66 L. Ed. 254; See also LASDON vs HALLIHAN, 1941, 36 N.E. 2d 227; MORELAND THEATERS CORPORATION vs PORTLAND MOVING PICTURES MACHINE OPERATORS PROTECTIVE UNION, 12 P. 2d 333, 140 Ore. 35. The evidence of the trial court is not supported by the authority. In 1 Restatement, Contracts, 110, §90, an implied contract may only come into being when a promise has been made by a promisor which should reasonably expect the other party to induce action or forebearance of a definite and substantial character on the part of the promisee and which does induce such action or forebearance. This undertaking is binding if injustice can be avoided only by enforcement of a promise.

Further, the courts of the State of Washington are ignoring established decision

laws which have been proclaimed by the Supreme Court of Washington including the bonus case of SPOONER vs RESERVE LIFE INSURANCE COMPANY, 47 Wn. 2d 454, 287 P. 2d 735 (1955). LUTHER vs NATIONAL BANK OF COMMERCE, 2 Wn. 2d 470, 98 P. 2d 667 (1940). HILL vs CORBETT, 33 Wn. 2d 219, 204 P. 2d 845. For application in employer-employee case see 1 Restatement of Contracts, 110 §90, see HUNTER vs SPARLING, 87 Cal. App. 2d 711, 197 P. 2d 807 (1948).

And as was stated in SPOONER vs RESERVE LIFE INSURANCE COMPANY, (supra):

> "Before this rule can be applied, there must be a real promise to be enforced. Action in reliance upon a supposed promise creates no obligation on an individual, or corporation whose only promise is wholly illusory."
>
> 1 Corbin on Contracts, 658, §201.

A supposed promise may be illusory because it is so indefinite that it cannot be enforced.

FORD MOTOR COMPANY vs KIRK MYER MOTOR COMPANY, 65 Fed. 2d 1001 (CA 4-1933), or by reasons of provisions or undertakings contained in the promise which in effect makes its performance optional or entirely discretionary on the part of the promisor. FONTINS SHOE COMPANY vs LAMBERKIN, 241 P. 542, (1933) and other cases cited at page 458 of SPOONER RESERVE LIFE INSURANCE COMPANY (supra).

To sustain the trial court and the appellate court's affirmance of the trial court's judgment, is to allow employees independent of any contract rules, statutes or regulations, to force companies to increase compensation if bonuses are ever paid. Further, there is no way that bonuses can be cut off if bonuses have ever been paid apparently in prior years, regardless of the financial ability of any company which has made bonus payments in the past. It would appear that companies or employers if they have a bad

year, must sell off capital acquisitions or go into debt as it absolutely has to pay the bonus as a part of salary or compensation at least equal to or more than the last years total compensation paid. The trial court and the courts of the State of Washington are writing the contracts of employment as to compensation for every Washington State employer independent of right or Statutory regulation.

This decision if it is maintained will certainly open the gates of labor management disputes and complicate labor and management relations. Some judgments or unpaid back salary --deferred compensation, plus interest due, may with larger type corporations run to obligations that the company has no knowledge of at this time, which would extend into the scope of millions of dollars and must be paid, even to a required liquidation of a firm.

The decisions as they presently stand do not merely affect the Petitioner, RIBLET TRAMWAY

COMPANY. They do not affect just one defendant employer but every employer and may be seized upon by other employees in other states as a touchstone for further compensation. The decision, at its present posture, has put the courts of the State of Washington into a volume of increased labor litigation which no one has ever foreseen. It has directly impaired the ability of firms to contract with their employees, and to compete with foreign state corporations, and has created a direct and an unreasonable burden on interstate commerce and has denied the Petitioner firm their right of association with employees of their choice and denied them equal protection of the law and has impaired their right to contract which has been secured by the United States Constitution. Freedom of contract will be a page in history if this decision is allowed to stand. Courts, independent of

employers contracts, will decide salaries by its considerations of so-called implied agreements which will ripen into enforceable contracts, if the court deems fit.

The trial court summed it up:

"THE COURT:

> Well, listen, at any rate, the whole question ended up this way: When there had been no specific agreement between an employee and employer, then can a set of facts come out later which the employer has a duty to pay a bonus? That's what it boils down to. It's in the record. I know."

This judicial construction of what an implied contract is, strikes at the heart of this issue.

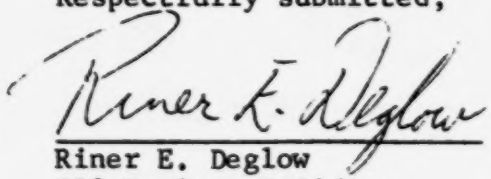
Certainly no court can claim substantial justice has been correctly accomplished, when the fact finder, has read into the employer-employee relations, an implied contract for additional compensation only when a bonus has been paid over a ten year period, independent

of any agreement and even though not negotiated by the employer or employee, or even discussed by any of them.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KENT D. SIMON, Respondent and Cross-appellant,	)	No. 518-III
vs	)	DIVISION THREE
RIBLET TRAMWAY COMPANY, Appellant,	)	
TONY SOWDER, Defendant.	)	

MUNSON, J.--Defendant Riblet Tramway Company appeals from a judgment for plaintiff, Kent D. Simon, for unpaid compensation; plaintiff cross-appeals from a denial of his claim for double damages and attorney's fees. Defendant Tony Sowder was dismissed from this action and no appeal is taken therefrom.

The primary issue on appeal is whether the payment of a "bonus" over a 10-year period can ripen into an implied contract for compensation where the amount thereof is discretionary with the employer, not negotiated by the employee and independent of the profits of the employer. Relying upon Powell vs Republic Creosoting Co., 172 Wash. 155, 19 P. 2d 919 (1933) the trial court answered in the affirmative. We agree.

Plaintiff was employed as an engineer by defendant company from May 1959 until June 1969. His total compensation each year included a monthly salary, a substantial "bonus" at the end of each year, and a sum contributed to an employee profit-sharing trust. The total compensation increased steadily from $3,559.38 in 1959 to $17,087.02 in 1968. The year-end "bonus" was paid to plaintiff each year of his employment and increased from $500 in 1959 to $6,000 in 1967 and 1968.[1] Neither the dollar

[1]The trial court found plaintiff received the following compensation as year-end salary, bonus and profit sharing:

YEAR	SALARY	BONUS	PROFIT SHARING
1959	$3,059.38	$ 500	
1960	5,126.41	1,000	$ 918.96
1961	5,590.54	1,250	1,026.08
1962	6,128.23	1,875	1,200.48
1963	6,219.95	1,875	1,214.24
1964	6,038.29	2,125	1,224.49
1965	7,650.00	3,000	1,597.50
1966	8,615.00	4,500	1,967.25
1967	8,739.44	6,000	2,210.92
1968	8,858.28	6,000	2,228.74
1969	4,367.68		

amount of the bonus paid plaintiff, nor the total amount of his compensation ever decreased from one year to the next. The bonus amounted to approximately 16 percent of plaintiff's annual salary for 1959 and increased to 68 percent thereof in 1968.

Plaintiff voluntarily terminated his employment in June 1969. At that time he requested a pro rate share of his 1969 year-end bonus. Using the previous 2 years' bonuses ($6,000) as a base, he requested 5/12ths thereof, or $2,500. Defendant denied the request, claiming the lump sum payment was a true bonus, i.e., completely discretionary, paid only to employees meriting a bonus, and when the company profit allowed for such a payment. Upon denial of his claim , plaintiff instituted this action.

The trial court found at the time plaintiff terminated his employment he was in good standing with defendant, there had never

been a discussion between the parties with regard to the bonus, and there was no relation between profitability of defendant and the payment of any bonus. There was no contention or evidence that defendant was financially unable to pay 1969 bonuses; in fact, most other employees of defendant received larger bonuses in 1969 than they had in 1968. It was also found that plaintiff's annual salary alone ($8,858.28 in 1968), without the annual lump sum payment, was inadequate compensation for an engineer with plaintiff's training and experience. The court then granted plaintiff judgment for $2,500 concluding:

> As a result of the course of dealing between the plaintiff and the defendant corporation through the years 1959 to 1969 as to the method of compensation, the court finds that there developed an implied agreement that the plaintiff's annual salary should be at least as great as the monthly compensation plus the annual lump-sum payment as received in each prior year taking into account

> the employer's contribution to the employee's profit-sharing trust, and that the regular monthly compensation without the annual lump-sum payment is inadequate compensation in view of the plaintiff's education, experience, professional license and expertise as a specialist.

Plaintiff, as well as the trial court, relied primarily upon Powell vs Creosoting Co., supra, an en banc decision.

In Powell, an engineer was sent to Seattle in 1916 to manage defendant's business. He was paid a set salary each year and a bonus payment at the end of the year. His annual compensation increased substantially, and with some regularity, mostly because of the bonus payments. The bonus itself increased each year and rose from approximately 25 percent to 63 percent of his stated yearly salary. Upon resigning in 1930, plaintiff brought suit for his bonus for the part of 1930 he had actually worked. In affirming judgment for plaintiff,

the Supreme Court, at 158, stated:

> In the beginning, the payment of $50, the bonus for the year 1916, may have been a gratuity only. Possibly the two succeeding years, when the bonus payments were $200 and $400 respectively, show nothing more than gratuities, but the eight years following, with substantial payments regularly made and regularly increasing, would seem to be something quite other than mere gifts, and to our minds this course of dealing suggests rather conclusively an implied agreement that respondent's annual salary should be the stated amount payable semi-monthly plus such additional sum as would be reasonable in the light of the services rendered for the particular year and the results accomplished thereby.

The Powell case and the instant case are factually very similar. The slight differences between the two cases, including the fact that plaintiff in Powell was a manager and plaintiff herein was not, do not make the two cases distinguishable. The bonuses paid plaintiff were "substantial payments regularly made and regularly increasing." For instance, in 1968 plaintiff's salary was $8,858.28 and his bonus

for that year was $6,000. The findings of fact herein are supported by substantial evidence. Thorndike vs Hesperian Orchards, Inc., 54 Wn. 2d 570, 343 P. 2d 183 (1959). Consequently, following Powell, we affirm the judgment for plaintiff upon the theory that the parties had an implied agreement to pay a bonus as part of plaintiff's earned compensation.

Plaintiff also sought judgment for twice the amount of wages withheld, costs of suit, and reasonable attorney's fees, pursuant to RCW 49.52.050 (2) and .070, alleging defendant willfully withheld his wages. The trial court denied plaintiff's claim upon the bases that defendant did not willfully intend to deprive plaintiff of his wages. We agree. RCW 49.52.050 (2) and .070 are not meant to apply to this factual situation; herein, there was a bona

fide disagreement between employer and employee with regard to whether a year-end payment was earned wages or merely a discretionary bonus. This situation evidences no intentional deprivation of wages as required to sustain a claim under RCW 49.52.050.

Defendant contends that even if plaintiff was found to be entitled to payment for the so-called bonus, he should be deemed to have waived $1,000 of the requested amount. Plaintiff was informed in April 1969 that the bonus would not be paid, and his continued employment until June 1969 estopped him from claiming any pro rata portion of the bonus for that period of time. We find no merit to this contention. Although the trial court did not specifically enter findings or conclusions on this issue, implicitly the court rejected this claim by entering full judgment for plaintiff. See

DeCoria vs Red's Trailer Mart, Inc., 5 Wn. App. 892, 491 P. 2d 241 (1971); Ingle vs Ingle, 183 Wash. 234, 48 P. 2d 576 (1935). The trial court found the bonus payment to be in actuality earned compensation. One cannot be held to waive what is later determined to be earned compensation merely by being put on notice that the employer does not consider the payment in question to be that type of compensation. The later determination that the payment was earned establishes plaintiff's right thereto.

Defendant also contends the court erred in admitting into evidence an income and salary survey of professional engineers prepared by the National Society of Professional Engineers. We disagree. The survey of engineers' salaries was undoubtedly hearsay. However, the survey was relevant to the issues raised. The data presented therein, being a broad gathering of

engineers' salaries, would have been difficult to present by individual testimony. Furthermore, the survey appears trustworthy and reliable, published by a reputable society, and without any apparent reason to falsify it. It has relevancy to one of plaintiff's contentions. Consequently, the survey was admissible. See Nordstrom vs White Metal Rolling & Stamping Corp., 75 Wn. 2d 629, 453 P. 2d 619 (1969); see also, Raybell vs State, 6 Wn. App. 795, 805, 496 P. 2d 559 (1972); Thorpe vs Boeing Co., 5 Wn. App. 706, 709, 490 P. 2d 448 (1971). Defendant's contentions that the survey did not cover salaries in the Spokane area specifically, that it was produced by a lobby group and that the sample of engineers covered by the survey was small, go to the weight to be given to this evidence by the trier of fact, not to its admissibility. We note there was other testimony pertaining to engineers' salaries within the Spokane area.

Defendant crossclaimed, asking for a setoff for alleged overpayment of vacation pay, and now appeals from the failure of the trial court to grant judgment in its favor for the requested amount. Defendant alleges plaintiff took his entire vacation for 1969 before he terminated his employment in June, that plaintiff's failure to work the full year nullified his right to full vacation pay and that, as a consequence, plaintiff should be required to repay a $224.97 vacation overpayment. The trial court did not enter any findings or conclusions with respect to vacation pay. We may assume, however, the trial court found adversely to defendant, the party with the burden of proof on this issue, by entering judgment for plaintiff in the amount of $2,500, the full requested sum. Decoria vs Red's Trailer Mart, Inc., supra; Ingle vs Ingle, supra. The

record on appeal is devoid of any evidence indicating plaintiff was paid this amount as vacation pay, or indicating company policy or custom requiring a full year of work as a requirement for allowance of vacation for that year. Consequently, defendant did not fulfill his burden of proving the claim for judgment for vacation overpayment and the court was correct in not so allowing.

Judgment affirmed.

Muson

WE CONCUR:

B. McInturff

GREEN, C. J. (concurring)--I concur in the foregoing opinion because of Powell vs Republic Creosoting Co., 172 Wash. 155, 19 P. 2d 919 (1933), and because the year-end payments were disproportionately large in relation to base salary. This decision should be carefully limited to its facts.

GREEN, C. J.

APPENDIX B

IN THE SUPREME COURT

of the

STATE OF WASHINGTON

KENT D. SIMON, Respondent and Cross-appellant,	)	No. 42741
vs	)	ORDER DENYING PETITION FOR REVIEW
RIBLET TRAMWAY COMPANY, Petitioner.	)	

The court having considered the petition for review of the decision of the Court of Appeals in this cause together with the answer thereto,

It is ordered that the petition be and it is hereby denied.

Dated this 1st day of May, 1973.

By the Court:

Chief Justice